No. 76-1192

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

WADE H. McCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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Although respondent United States Steel Corporation "joins in urging that the Court grant the petition for a writ of *certiorari*" (Br. 3-4),[1] it requests that the Court consider an additional question not presented in the petition, *i.e.*, "[w]hether 18 U.S.C. §1905 is a statute which specifically exempts matters from disclosure within the meaning of Exemption 3 of the Freedom of Information Act * * *" (Br. 1; see Br. 3-8). That question was answered affirmatively by the court of appeals. But we did not present the question in our petition, because, contrary to respondent United States Steel Corporation, not only is this not "the fundamental issue in this case" (Br. 5), it is not an issue that bears at all upon the disposition of the case in its present posture. Nor is

[1] Although respondents General Motors Corporation and Westinghouse Electric Corporation have filed a joint brief opposing certiorari, they nevertheless concede that these cases "raise important issues concerning the purpose of the Freedom of Information Act * * * and the rights of private parties under the Act" (Br. 2-3).

there a "clear conflict of decisions among the circuit courts" (*id.* at 7) on the question. Accordingly, we believe that this case should not be burdened by the additional question that respondent United States Steel Corporation seeks to raise.

1. If the petition is granted, this Court will have no occasion to consider the question whether material of the character described in 18 U.S.C. 1905, a criminal statute forbidding the disclosure by government officials of certain documents "in any manner or to any extent not authorized by law * * *," is protected from mandatory disclosure by exemption 3 of the FOIA. The government argues that regulations promulgated by the Secretary of Labor (41 C.F.R. Part 60-40), which provide for the disclosure of the documents in issue, "authorize" such disclosure within the meaning of 18 U.S.C. 1905. If that argument is sustained, it would be immaterial whether exemption 3 of the FOIA incorporates 18 U.S.C. 1905, since disclosure of the documents would not be prohibited by the latter provision.

If the government's argument with respect to those regulations is rejected, the Court will be left with a finding by the courts below, made after a *de novo* trial in the district court, that the documents ordered withheld are protected from mandatory disclosure by exemption 4 of the FOIA. If the Court determines that a *de novo* trial should not have been held, the appropriate disposition of the case would be to vacate and remand. That disposition would not require the Court to consider whether exemption 3 incorporates 18 U.S.C. 1905. If the Court determines that the *de novo* trial was proper, then the finding of the courts below that the documents are protected from mandatory disclosure by exemption 4 would make it unnecessary for the Court to decide whether the documents also were protected from mandatory disclosure by exemption 3.

2. Respondent United States Steel Corporation alleges (Br. 7) a conflict between the Fourth Circuit and the District of Columbia Circuit on the question whether 18 U.S.C. 1905 is an exemption 3 statute. There is no conflict. In *Sears, Roebuck and Co.* v. *General Services Administration,* No. 75-2127, decided April 1, 1977,[2] the District of Columbia Circuit explained that that question is open to reconsideration in that circuit, in view of this Court's decision in *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, and the recent amendment to the wording of exemption 3 (Pub. L. 94-409, 90 Stat. 1247).[3] That amendment did not become effective until after the Fourth Circuit's decision in this case, and it does not appear that the court below gave consideration to the effect the amendment might have on the question.[4] Thus, neither the Fourth Circuit nor the District of Columbia Circuit can be said to have ruled definitively on the question respondent United States Steel Corporation would have this Court consider.

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[2]The court of appeals' opinion in *Sears* is set forth in an Appendix to the supplemental memorandum for the federal respondents in *Prudential* v. *National Organization for Women,* No. 76-1052.

[3]The court said its statement in *National Parks and Conservation Association* v. *Kleppe,* 547 F. 2d 673—that the newly amended exemption 3 did not incorporate 18 U.S.C. 1905—was *dicta.* It remanded in *Sears, supra,* slip op. 13, with the instruction to the district court that it "is free to reconsider" the question.

[4]The Fourth Circuit, in holding that 18 U.S.C. 1905 was an exemption 3 statute, depended in large measure upon analogy to this Court's decision in *Administrator, Federal Aviation Administration* v. *Robertson, supra,* which concerned Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson.* See H.R. Rep. No. 1178, 94th Cong., 2d Sess. 14 (1976).

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted, limited to the questions presented therein.[5]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

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[5]Reuben B. Robertson, III, has filed a brief as *amicus curiae* in support of the government's petition for a writ of certiorari. (It was petitioners' decision to honor Robertson's FOIA request that led respondent General Motors to institute its "reverse FOIA" suit to enjoin disclosure.) But in addition to the questions presented in the petition, Robertson requests that the Court also consider the question whether he is an indispensable party to this action and must be joined as a party pursuant to Rule 19, Fed. R. Civ. P.

Robertson's request is untimely. He was aware that respondent General Motors had brought suit in the District Court for the Eastern District of Virginia, but he made no effort to intervene as a party in the district court or in the court of appeals. See Rule 24, Fed. R. Civ. P. Nor did he attempt in either forum to have his views considered. Instead, Robertson chose to bring a separate FOIA suit against the government in the District Court for the District of Columbia, claiming that the information in question was subject to mandatory disclosure. *Robertson* v. *Department of Defense*, 402 F. Supp. 1342 (D. D.C.). Having elected not to present to the courts below the argument he now seeks this Court to consider, Robertson should not be permitted at this late date to interpose the issue whether he should have been joined as an indispensable party.

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